

Pooja K.

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 77 OF 2013

Shaikh Abdulla Bahauddin	... Appellant
<i>Versus</i>	
Shaikh Ismail Shaikh Habib and Ors.	... Respondents
...	
Mr. N.B. Khandare – Advocate for Appellant	
....	

CORAM : GAURI GODSE, J.

DATE : 10th February, 2023

PER COURT :

1. This Second Appeal is preferred by the original defendant for challenging the concurrent decrees for partition and separate possession.

2. The respondents had filed Regular Civil Suit No.557 of 1982 for partition and separate possession. By judgment and decree dated 26th July, 1993 the learned Joint Civil Judge Junior Division Parli, had decreed the suit and respondents were held entitled to half share and separate possession to the extent of Survey no. 491 out of the suit property. The said decree was challenged by the defendant by filing Regular Civil Appeal No. 81 of 1993. The Respondents had filed cross objections for challenging the

Judgment and Decree to the extent of refusal of grant of relief in its entirety. The said appeal was dismissed by learned District Judge -2, Ambajogai by judgment and decree dated 8th February, 2012. The first Appellate Court allowed the cross objections. In addition to half share granted by trial Court, Respondent no. 5 is held entitled to half share of her brother. Hence, this Second Appeal by the defendant.

3. Learned counsel for the appellant submitted that, the appellant had produced on record a partition deed which showed that partition had already been effected and in view of the partition, the respondents had given up their rights. Learned counsel also submitted that, it is not in dispute that, the respondents would not be entitled to half share in the suit property, however in view of the partition effected as per the documents produced exhibits – 88 and 115, the respondents had already accepted their shares. Hence, now they were not entitled to seek partition of the suit property. He further submitted that, though evidence was produced on record both the Courts erroneously discarded the credibility of the documentary evidence. He therefore submitted

that, the exhibited documents clearly established that partition was already effected and therefore the respondents were not entitled to claim any share in the suit property.

4. He therefore submitted that, question of law arises in the Second Appeal with respect to proper appreciation of the documents on record at Exhibits 88 and 115 regarding partition and the theory of prior partition as per the said documents. He therefore submitted that, the Second Appeal needs consideration on the said substantial question of law.
5. I have considered the submissions made on behalf of the appellant. I have carefully perused the record of the Second Appeal. The trial Court had framed issues on the point of prior partition as claimed by the defendant as well as the case of the defendant with respect to giving share to the extent of 8 acres land to the father of plaintiffs pursuant to the earlier partition. The trial Court after examining the documents produced at exhibits 88 and 115 as well as the oral evidence, has discarded the credibility of the said documents for the purpose of accepting the theory of prior partition. The trial Court has

examined oral evidence in support of the said documents and by recording reasons have concluded that there was no evidence produced on record to prove partition by metes and bounds pursuant to partition documents relied upon by the defendant. Hence, the trial Court has discarded the theory of prior partition. The first appellate Court has also framed points for consideration on the theory of prior partition claimed by the defendant. The first appellate Court on re-examining and re-appreciating the documentary as well as oral evidence has disbelieved the case of prior partition as pleaded by the defendant. Thus, the first appellate Court confirmed the findings of the trial Court and dismissed the Appeal.

6. Perusal of the Judgments of both the Courts show that nothing is produced in support of the theory of partition as well as actual division as per the said partition on the basis of the documents at Exhibits 88 and 115. It is not in dispute that, the plaintiffs were entitled for half share. However, the only reason to oppose the prayer for partition is the ground of prior partition and that the father of the plaintiffs were handed over 8 acres of land out of

the suit property. Even as per the theory of partition sought to be made out by the defendant, the suit property was not divided equally. Since there is conclusion recorded by both the Courts after carefully examining the documentary and oral evidence, I do not see any reason to interfere with the concurrent findings of fact recorded by both the Courts. All the submissions made on behalf of appellant are based on facts. I do not find any illegality or perversity in the reasons recorded by both the Courts.

7. Second Appeal does not raise any question of law hence, the Second Appeal is dismissed.

[GAURI GODSE]
JUDGE